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No. 87-2051

In The

Supreme Court of the United States

October Term, 1989

M.J.R., INC., et al.,

Petitioners,

vs.

CITY OF DALLAS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONERS M.J.R., INC., et al.

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ARGUMENT

I

THE DALLAS SEXUALLY-ORIENTED BUSINESS LICENSING ORDINANCE MAY NOT BE ANALYZED UNDER A DEFERENTIAL STANDARD OF REVIEW.

Apparently conceding that Dallas' sexually-oriented business licensing ordinance cannot withstand strict judicial scrutiny, respondents have relied almost exclusively upon their novel and unsupported assertion that this licensing law should be analyzed under a deferential standard of judicial

review.[1] They attempt to justify this standard by incorrectly characterizing this licensing ordinance as a time, place or manner restriction. Failing that, they assert deferential scrutiny should be applied simply because they believe petitioners' expression deserves less than full First Amendment protection. Neither contention has merit. Moreover, acceptance of respondents' position would require the overruling of this Court's many cases requiring strict scrutiny of content-neutral licensing laws affecting speech activities. More importantly, adoption of their position would so weaken the overall scope of First Amendment protection for speech and press as to permit any governmental entity claiming a content-neutral purpose to use license laws to restrain any type of speech deemed undesirable.

A. Respondents' Assertion That Dallas' Licensing Ordinance Is A Time, Place And Manner Restriction Is Patently Frivolous.

In their attempt to characterize this licensing ordinance as a time, place and manner regulation (thereby justifying deferential scrutiny), respondents have ignored the *sine qua non* of a time, place or manner regulation: it must not only be content-neutral and leave adequate alternative avenues for communication, **it must also in fact *be* a time, place and manner regulation!**

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[1] A "deferential" standard of review would permit the substantive features of this ordinance challenged as overbroad to be upheld essentially upon proof of a mere rational basis for their enactment. See *Ward v. Rock Against Racism*, ___ U.S. ___, 109 S.Ct. 2746, 2757-58 (1980). In contrast, a "strict" standard of review would require proof that a particular challenged provision was indispensable in order to further compelling and overriding municipal interests. This Court has uniformly employed this strict scrutiny for all laws which directly affect speech activities. In contrast, the "deferential" standard is employed in cases where laws only indirectly affect speech activities (see *United States v. O'Brien*, 391 U.S. 367 (1968)) or where content-neutral laws which leave open ample alternative avenues of communication regulate only the time, place or manner of expression.

In their opening brief, petitioners pointed out that this Court's decision in *Lovell v. Griffin*, 303 U.S. 444 (1938), established that licensing laws are, by definition, *not* time, place or manner regulations. This truism was also noted by Judge Thornberry in his dissenting opinion below. Although respondents have stressed the assertedly content-neutral purposes underlying this licensing ordinance, it nonetheless prohibits "adult" businesses from operating at *any* time, at *any* location within the City, and in *any* manner absent the prior obtaining of a license.

Moreover, this licensing ordinance may not be treated as a time, place or manner regulation because there is no alternative avenue of communication available to one who has been denied a license. For example, in *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976), and *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), this Court held that the challenged adult zoning ordinances provided ample alternative locations. Thus, those ordinances qualified for the deferential scrutiny applicable to time, place and manner restrictions.[2] Here, an individual denied a license cannot operate an adult cabaret or adult bookstore at any other alternative location within the City. The denial of a license is a complete ban upon that individual's First Amendment right to engage in lawful expression. As such, the deferential scrutiny which is applicable to time, place and manner regulations or available under the *O'Brien* test, is completely impermissible here.

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[2] In *Young*, the Court, per the concurring opinion of Justice Powell, described the appropriate test as that of *United States v. O'Brien*, 391 U.S. 367 (1968). In *Renton*, a majority of this Court held that the appropriate test was that for a time, place and manner restriction. This Court's recent opinion in *Ward v. Rock Against Racism*, ___ U.S. ___, 109 S.Ct. 2746, 2757 (1989), made clear that the standards of review under *O'Brien* and time, place and manner analysis are essentially identical.

B. Adoption Of Less Than Strict Scrutiny For Content-Neutral Licensing Laws Applying To Speech Activities Would Overrule Many Decades Of This Court's Cases And Would Gut The Protections Of The First Amendment As Intended By The Framers.

Even if not a time, place or manner regulation, respondents appear to contend that Dallas' sexually-oriented business licensing ordinance was adopted for content-neutral purposes and therefore should be analyzed under deferential scrutiny and should also be exempt from compliance with the substantive and procedural safeguards applicable to all First Amendment licensing laws under the *Lovell v. City of Griffin*, 303 U.S. 444 (1938), and *Freedman v. Maryland*, 380 U.S. 51 (1965), lines of cases. Even assuming, *arguendo*, that the ordinance was enacted for legitimate content-neutral purposes, this Court's decisions hold that strict judicial scrutiny and heightened safeguards are still required.

In *City of Lakewood v. Plain Dealer Publishing Co.*, ___ U.S. ___, 108 S.Ct. 2138 (1988), the City had enacted a content-neutral license requirement for all persons maintaining newsracks on public sidewalks. Although some disputed whether there was a First Amendment right to *have* a newsrack on a public sidewalk, every Justice agreed with the majority's holding that the strict scrutiny of "the *Lovell-Freedman* line of cases would be applicable . . . if the City . . . required licenses for all stores which sold newspapers." [Dissenting opinion of Justice White joined in by Justices Stevens and O'Connor, ___ U.S. at ___, 108 S.Ct. at 2155.] That is the situation here. Dallas has required an annual business license for all adult cabarets and bookstores. Obviously, since the substantive and procedural safeguards of the *Lovell* and *Freedman* lines of cases apply to the content-neutral annual business license requirement in *Plain Dealer*, they must also apply here. If the respondents' position were adopted herein, permit requirements such as that involved in *Plain Dealer* would no longer be subject to the *Lovell* or *Freedman* lines of cases because of their content-neutral purpose. Yet all the harms identified by this Court in *Plain*

Dealer would continue to exist in the permit requirement, notwithstanding its content-neutral purpose.

Similarly, the parade permit stricken in *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969), was surely content-neutral (i.e., it did not single out particular types of parades based on content), but it was still subjected to strict scrutiny in order to prevent the potential for censorship which is always inherent in even a content-neutral licensing requirement.

The same can also be said for this Court's decisions in *Schneider v. State*, 308 U.S. 147 (1939) (striking a content-neutral permit requirement for distribution of *any* types of handbills on public streets or sidewalks notwithstanding legitimate purpose of litter prevention); *Largent v. Texas*, 318 U.S. 418 (1943) (striking a content-neutral permit requirement for sale of *all* books or tracts in the City); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (striking a content-neutral license tax for all persons selling *any* items door-to-door – law found deficient as applied to those engaged in First Amendment activity); *Saia v. New York*, 334 U.S. 558 (1948) (striking content-neutral permit requirement for public use of sound amplification devices notwithstanding legitimate content-neutral purpose); and *Riley v. National Federation of the Blind of North Carolina, Inc.*, ___ U.S. ___, 108 S.Ct. 2667, 2680 (1988) (striking content-neutral permit requirement for professional fund raisers due to lack of adequate procedural safeguards under *Freedman*). In each of these cases, laws were stricken under strict judicial scrutiny even though they applied to all persons, regardless of the content of their message and even though many of them were enacted for legitimate reasons unrelated to the content of the expression regulated. Thus, the mere fact that the Dallas ordinance may have been enacted for legitimate purposes unrelated to the suppression of expression would not, even if true, allow it to avoid compliance with the strict substantive and procedural safeguards of the *Lovell-Freedman* lines of cases, nor, since this is a licensing law (and hence, a prior restraint by definition) would a content-neutral purpose allow the ordinance to escape the strict judicial scrutiny and the presumption of

invalidity applicable to all prior restraints. *See*, e.g., *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 and 558-559 (1975).[3]

In sum, respondents would have this Court abandon the strict judicial scrutiny of the *Lovell-Freedman* lines of cases on the mere assertion of a legitimate content-neutral purpose in support of a speech-related licensing requirement. It should be clear from the cases cited above that adoption of respondents' position would require the overruling of almost the entire body of First Amendment licensing jurisprudence and would gut the First Amendment of the protections which have traditionally safeguarded minority or controversial expression.

C. The Fact That Petitioners Are Engaged In Constitutionally Protected Expression Which Is Sexually-Oriented Does Not Warrant A Lesser Standard Of Judicial Scrutiny.

As a third way of attempting to obtain a deferential standard of judicial review, respondents have baldly asserted that the sexually-oriented nature of petitioners' constitutionally protected expression gives the City *carte blanche* to establish a licensing law immune from traditional strict First Amendment scrutiny. This assertion not only conflicts with existing Supreme Court case law (none of which respondents discussed), but is also a radical and dangerous departure from fundamental First Amendment principles that have guaranteed a forum for the evolution of unpopular or minority opinions throughout tnis Country's history.

First, *Freedman* itself applied strict, rather than deferential, scrutiny to a licensing law affecting individuals similarly situated to petitioners herein. There, strict procedural safeguards were required to protect sexually-oriented expression which stayed on the protected side of that dim and uncertain

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[3] See also, *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575, at 592 (1983) ("[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment").

line separating protected expression from obscenity. Unless this Court overrules *Freedman* and its progeny,[4] it cannot adopt a deferential standard of scrutiny for licensing laws affecting sexually-oriented expression.

Second, even in the non-licensing context, this Court has consistently rejected the suggestion that certain types of non-obscene sexually-oriented expression are entitled to less than full First Amendment protection. For example, in *Young v. American Mini Theaters, supra*, Justice Stevens, joined by three other members of the Court, was of the opinion that, at least in the context of a *zoning* regulation (as distinct from a *licensing* law as involved here), less than full First Amendment scrutiny could be applied where the expression at issue was sexually-oriented but non-obscene. However, a majority of the Court refused to accept that position even in the context of the time, place or manner restriction there at issue.[5] Similarly, in *F.C.C. v. Pacifica Foundation, Inc.*, 438 U.S. 726 (1978), another case involving a time, place or manner restriction, this Court again refused to embrace the notion, suggested by a plurality, that a lesser standard of constitutional protection should apply to non-obscene "indecent" speech.[6]

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[4] Similarly, this Court would also have to overrule, *inter alia*, *Teitel Film Corporation v. Cusack*, 390 U.S. 139 (1968); *United States v. 37 Photographs*, 402 U.S. 363 (1971); *Blount v. Rizzi*, 400 U.S. 410 (1971); and *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975), all of which applied a standard of strict judicial scrutiny requiring *Freedman's* procedural safeguards in various laws aimed at the separation of obscenity from sexually-oriented expression which is constitutionally protected.

[5] See the dissenting opinion of Justice Stewart (speaking for four members of the Court), 427 U.S. at 84 and the concurring opinion of Justice Powell, 427 U.S. at 73, n. 1.

[6] See the concurring opinion of Justice Powell (joined by Justice Blackmun) at 438 U.S. at 761 (stating: "I do not join [the plurality] because I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected

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Most recently, in *Sable Communications v. F.C.C.*, ___ U.S. ___, 109 S.Ct. 2829 (1989), this Court unanimously struck down an FCC regulation which banned non-obscene "indecent" telephone messages. It did not even suggest that "indecent" speech was entitled to anything less than full First Amendment protection.

Finally, for *policy* reasons, this Court must reject the dangerous notion that the degree of protection of speech should fluctuate with the value which five members of this Court perceive that speech to have.[7] We know that what is perceived as "valuable" can fluctuate greatly over time. As eloquently stated by Justice Holmes, dissenting in *Abrams v. United States*, 250 U.S. 616, 630 (1919):

> "[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of

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by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection") and the dissenting opinion of Justice Brennan (joined by Justice Marshall) at 438 U.S. at 762-763 (describing as "completely antithetical to basic First Amendment values [the notion] that the degree of protection the First Amendment affords protected speech varies with the social value ascribed to that speech by five Members of this Court"). Justice Stewart, the fifth Member of the Court rejecting the plurality opinion, found it unnecessary to address the point as he thought the statute could be saved by construction. However, Justice Stewart had expressed his views in his dissenting opinion in *Young*, *supra*.

[7] As pointed out by Judge Kozinski in *United States v. United States District Court*, 858 F.2d 534, 541 (9th Cir. 1988), "the first amendment is as close to an absolute as we have in our jurisprudence: Speech shielded by the amendment's protective wing must remain inviolate regardless of its inherent worth. The distaste we may feel as individuals toward the content or message . . . cannot, of course, detain us from discharging our duty as guardians of the Constitution." He then cited as examples the Ku Klux Klan's cross-burning upheld in *Brandenburg v. Ohio*, 395 U.S. 444, 448-449 (1969) and the right of Neo-Nazis to march through Jewish neighborhoods in a peaceful fashion upheld in *Collin v. Smith*, 578 F.2d 1197, 1203 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

> their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."

While some may well believe that sexually-oriented expression has comparatively less "value" than certain other forms of expression, the rental of many tens of millions of sexually-oriented videotapes every year in this country suggests that one citizen's idea of "value" may be quite different from another's. Moreover, if this Court were to permit diminished First Amendment protection depending upon the content of expression, it would begin a descent into a constitutional abyss from which it could not return. Not only would there be no principled way to distinguish speech based upon its perceived value[8], there would be no principled way to define the fluctuating extent of protections available to these various categories of protected expression.

Perhaps most importantly, as *Freedman* recognized, the licensing of sexually-oriented expression is an area where there is an enormous potential for administrative abuse of otherwise valid licensing laws. But for *Freedman*'s procedural safeguards, a hostile licensing official could delay acting on a permit application until the applicant could no longer afford to continue attempting to open a bookstore or cabaret. A

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[8] For example, in the present case, respondents request a diminished level of protection for laws regulating businesses engaged in sexually-oriented expression. In *F.C.C. v. Pacifica*, *supra*, and in *Sable*, *supra*, a similar *but by no means identical* classification was chosen, i.e., non-obscene "indecent" expression. Not only are the contours of "indecency" impossible to accurately define, there is no reason to presume that the contours of that category would be co-extensive with the contours of the type of sexually-oriented expression subject to regulation in *Young* and in the present case, i.e., all "sexually-oriented" expression.

Moreover, this list need not be exhaustive. Once this Court allows itself to make distinctions based upon perceived value, there is no limit to the number of categories and sub-categories that could be created. For example, while many would share the opinion that Nazi [or Ku Klux Klan, or Devil worship, etc.] propaganda has little, if any, value, no one has yet asserted that it is not entitled to full First Amendment protection.

judicial petition for administrative mandamus would not provide a meaningful remedy. First, the expense of such a proceeding would deter all but the best financed and most determined as the store would be required to remain closed (thus not producing income) while the litigation continued. Moreover, in many if not most states, the relief available in administrative mandamus does not include an order compelling issuance of a permit. Rather, if a court agrees with a petitioner, it merely remands the matter back to the agency which can then see whether there may be any *other* bases available for denying the permit. A hostile administration could continue this game until even the most determined and best financed applicant would be forced to give up. It is only *Freedman*'s requirement for express procedural safeguards on the *face* of a licensing ordinance which prevents this scenario from taking place.[9]

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[9] This Court needs no further proof that the removal of strict procedural safeguards would result in the total suppression of the First Amendment rights of persons engaging in constitutionally protected expression which is sexually-oriented. As recently as last term, enforcement officials in Fort Wayne, Indiana had padlocked three adult bookstores and seized all of their inventory, all on a mere *ex parte* presentation to a judge. *Fort Wayne Books, Inc. v. Indiana*, 109 S.Ct. 916 (1989). But, for this Court's constant requirement of rigid adherence to strict procedural safeguards, those same officials and officials just like them around the country could and would immediately achieve the suppression of sexually-oriented constitutionally protected expression through the unprincipled use of the type of content-neutral licensing laws advocated by the City of Dallas herein.

Other historical examples abound to illustrate the point that sexually-oriented expression would disappear almost overnight if not for this Court's rigid adherence to strict substantive and procedural safeguards when dealing with such expression. See, e.g., *Marcus v. Search Warrants*, 367 U.S. 717 (1961) (illegal mass seizure of 11,000 copies of 280 publications from adult bookstore based solely on officer's personal opinion that they were obscene); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964) (illegal mass seizure of 1,715 books from adult bookstore without any prior adversary hearing); *Lee Art Theatre*,

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In sum, where, as here, the *licensing* of First Amendment businesses is at issue, there is simply no "diminished" standard of judicial scrutiny that will provide any meaningful protection of First Amendment rights.

II

RESPONDENTS HAVE FAILED TO JUSTIFY THE ORDINANCE'S LACK OF PROCEDURAL SAFEGUARDS AS REQUIRED BY *FREEDMAN V. MARYLAND, SUPRA.*

The *Freedman* issues in this case are essentially twofold: (1) Do the *Freedman* standards apply; and (2) does the Dallas ordinance contain them? As will be shown below, respondents' attempts to distinguish *Freedman* are meritless and they have virtually conceded that the ordinance cannot pass muster under a *Freedman* analysis.

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Inc. v. Virginia, 392 U.S. 636 (1968) (illegal seizure of motion picture films from motion picture theater based solely on conclusory affidavit by officer in ex parte proceeding); *Roaden v. Kentucky*, 413 U.S. 496 (1973) (illegal warrantless seizure of film from motion picture theater); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979) (illegal search and seizure of adult bookstore by judicial officer who was not "neutral and detached").

Similarly, in the licensing area, but for this Court's intervention, abuses would be commonplace. See, e.g., *Teitel Film Corp. v. Cusak*, *supra*, 390 U.S. 139 (1968) (but for this Court's intervention, City of Chicago would have been allowed 57 days for censor to deny film exhibition license and there would have been no provision for prompt judicial decision); *Blount v. Rizzi*, *supra*, 400 U.S. 410 (1971) (but for this Court's intervention, postal service could have unilaterally concluded that certain mail was "obscene" and therefore "non-mailable" and would not have had to obtain judicial approval of such a decision); *Southeastern Promotions, Ltd. v. Conrad*, *supra*, 420 U.S. 564 (1975) (City would have succeeded in preventing performance of the rock musical "Hair" pursuant to a scheme devoid of procedural safeguards, but for this Court's intervention); and *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (sexually-oriented expression would have been banned by informal intimidation but for this Court's intervention).

A. Respondents' Attempted Distinctions Of *Freedman* Have Absolutely No Merit.

Respondents first assert that *Freedman*'s procedural safeguards are only required where the government is "seeking to suppress the *content* of undesired expression" (respondents' brief at 23), citing *Freedman*, *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308 (1980), and *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977). Tellingly, they neither cite nor attempt to distinguish this Court's opinion in *Riley v. National Federation of the Blind of North Carolina*, *supra*, ___ U.S. ___, 108 S.Ct. 2667 (1988), which, as repeatedly pointed out by petitioners in their opening brief, imposed *Freedman*'s procedural safeguards upon a content-neutral licensing requirement for all professional fund raisers.

Not only is *Riley* dispositive of respondents' attempted "content-neutral" distinction of *Freedman*, but it is also consistent with this Court's general approach to licensing laws affecting speech. Specifically, *Freedman* pointed out that the special dangers of laws requiring a license to engage in speech require not only the imposition of *substantive* safeguards (to prohibit any discretionary grounds for denying a license), but also require imposition of *procedural* safeguards (to protect against censorship by delay or unduly burdensome procedural requirements for obtaining a license). In the *substantive* safeguards cases, this Court has never distinguished between permit laws which are based on content and those which apply to all speech regardless of content. For example, the permit requirements stricken in *Hague v. C.I.O.*, 307 U.S. 496 (1939), and *Kunz v. New York*, 340 U.S. 290 (1951), applied only to persons engaged in speech of a particular type of content. In *Hague*, a permit was needed to lease a hall for a public meeting *involving advocacy of obstruction of the government*. In *Kunz*, a permit was needed to hold meetings on streets only *if they were of a religious or public worship nature*.

However, the *absence* of content-based classifications did not prevent this Court from requiring the same substantive safeguards for the content-neutral permit requirements stricken in, e.g., *Schneider v. State*, *supra*, 308 U.S. 147

(1939) (permit needed to distribute *any* handbills on public streets or sidewalks regardless of content); *Saia v. New York*, 334 U.S. 558 (1948) (permit needed to use any sound amplification devices in public regardless of content of message) and *City of Lakewood v. Plain Dealer, supra*. The point here is that the substantive and procedural safeguards which this Court has required of licensing laws affecting speech are necessary *regardless* of whether the law is content-based or content-neutral. Any other conclusion would allow the rampant suppression of expression whether sexually-oriented, religious, political or otherwise.[10] Clearly, *Riley*'s extension of *Freedman*'s procedural safeguards into the content-neutral area is inescapably required by this Court's prior decisions. Moreover, respondents have not even asserted that this Court should overrule its decision in *Riley* nor, for the reasons mentioned above, would such a decision be wise.

B. Respondents Virtually Concede That The Procedural Safeguards Required by *Freedman* Are Not Present In This Licensing Scheme.

While respondents assert (at pp. 26-27) that this licensing scheme contains "ample" procedural safeguards for a licensing law subject to deferential judicial scrutiny, they do not even suggest that it contains the procedural safeguards required by *Freedman*. Petitioners pointed out that the ordinance does not limit the time for initial denial of a permit application (BOP[11] 18-19). The City's only response is that "it provides reasonable time periods within which the City must respond to applications and appeals." The City neither

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[10] Moreover, as illustrated by *Murdock v. Pennsylvania, supra*, 319 U.S. 105 (1943), even laws which require permits of primarily non-expressive activity must comply with the substantive and procedural safeguards of *Lovell* and *Freedman* when applied to those engaged in protected expression. See discussion of this point in *People v. Fogelson*, 21 Cal.3d 158, 164, n.6, 145 Cal.Rptr. 542, 545, n.6, 577 P.2d 677 (1978).

[11] Brief of petitioners M.J.R., Inc., et al.

asserts any error in the petitioners' assessment of the ordinance's meaning nor do they purport to offer any authoritative saving construction.

Similarly, petitioners pointed out that an applicant must refrain from speech while an appeal to the Permit and License Appeal Board is pending and that there is no time limit for a final decision by that Appeal Board. Respondents did not dispute that statement.

Similarly, petitioners pointed out that it is the denied applicant, and not the City, that has the burden to pursue any appeal taken from a license denial. Respondents do not dispute this.

Finally, although respondents point out that an appeal from the Permit and License Appeal Board can be taken to the State District Court "where a temporary restraining order may be obtained . . . pending a hearing on a temporary injunction," they do not contend that the ordinance guarantees issuance of such a stay and, more importantly, they do not dispute that the ordinance fails to limit the overall amount of time between filing of an application and the ultimate availability of judicial review.

In sum, respondents have conceded that this ordinance does not come close to meeting the necessary procedural requirements of *Freedman v. Maryland*.

III

RESPONDENTS' ATTEMPTS TO DISTINGUISH *NEAR V. MINNESOTA*, 283 U.S. 697 (1931), ARE EQUALLY WITHOUT MERIT.

In petitioners' opening brief, they pointed out that the provisions of the ordinance authorizing license denial or revocation for prior speech-related offenses are clearly prohibited by this Court's holding in *Near v. Minnesota*, *supra*, that government cannot prohibit future speech due to past speech violations. Respondents have attempted to distinguish *Near* on a variety of grounds, none of which have any merit.

They characterize denials and revocations as "temporary" even though a prior speech violation bars licensure for from 2

to 5 years, depending upon the seriousness of the violation. They assert that no speech will be restrained by the denial of a license because there will be others eager to take the place of the denied applicant. Their boldly stated basis for this conclusion is the zoning law's amortization requirement, which will close 106 currently operating businesses and force them to compete for 50 available sites. See respondents' brief at 21, n. 9. None of these arguments distinguishes *Near*.

As stated in *Southeastern Promotions, Ltd. v. Conrad*, *supra*, 420 U.S. at 555, n. 8: "A licensing system need not effect total suppression in order to create a prior restraint." As also pointed out in Justice Brennan's plurality opinion in *Elrod v. Burns*, 427 U.S. 347, at 374 (1976), "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Moreover, from the denied applicant's perspective, the restraint under Dallas' ordinance is as bad, if not worse, than that in *Near*. The applicant with a prior speech violation is barred for several years *anywhere* in Dallas. In contrast, Mr. Near was at least free to start a new newspaper under a different name so long as he steered clear of scandalous publications.

Respondents further support their licensing scheme as one that will "curb identifiable persons who may reasonably be expected, because of their conduct in recent years, to promote . . . the criminal conduct that sexually-oriented businesses have been shown to foster." (P. 11) However, at least to the extent that license denial is based upon prior speech violations, this statement concedes that the purpose is to prevent the possibility of future speech violations by those who have committed speech violations in the past. This is precisely what *Near* prohibited.[12]

Respondents further assert that the Dallas ordinance has "no attributes of censorship" because its "purpose is not to

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[12] As this Court characterized its holding in *Near*, in *Kingsley Books v. Brown*, 354 U.S. 436, 445 (1957), "Minnesota empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive. . . .[T]his is of the essence of censorship."

suppress expressive material, but to reduce crime." (P. 13) However, as this Court recently noted in *Fort Wayne Books v. Indiana, supra*, ___ U.S. ___, 109 S.Ct. 916, 929 (1989), "*Near* . . . recognized that the way in which a restraint on speech is 'characterized' under State law is of little consequence." Although this Court, in *Fort Wayne Books*, agreed that the asserted purpose of Indiana's RICO law was not "pretextual," it nonetheless concluded that the seizure provisions violated First Amendment guarantees. Similarly, the asserted content-neutral purpose of Dallas' ordinance does not shield its effect from a *Near* analysis.

For all the reasons above, the provisions of the Dallas ordinance mandating denial or revocation of a license for prior speech violations are indistinguishable from the prior restraint in *Near*. Petitioners urge this Court to strike this prior restraint as clearly and decisively as it did in *Near*.

IV

RESPONDENTS HAVE FAILED TO JUSTIFY THE NON-SPEECH LICENSING DISQUALIFICATION CRITERIA.

In essence, respondents rely on *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), to sustain license denial or revocation based upon prior convictions for non-speech offenses. However, such reliance is misplaced.

First, the public nuisance injunction at issue in *Arcara* was upheld under a *deferential* standard of review. The majority pointed out, however, that strict scrutiny would be required if a law "has the inevitable effect of singling out those engaged in expressive activity." 478 U.S. at 707. Respondents assert that this licensing scheme does not "single out" those engaged in First Amendment activity because 10 of the 13 disqualifying crimes are not speech-related offenses. However, that argument misses the point. The *Arcara* statute applied to persons engaged in *any* type of business, whether expressive or not. Here, the adult cabaret license and adult bookstore license requirements apply only to persons engaged in expressive activity. As pointed out in *Minneapolis Star v.*

Minnesota Commissioner of Revenue, 460 U.S. 575 (1983), whenever any law singles out persons engaged in expressive activity, there is always the danger that such a law will be applied other than even-handedly. For that reason, strict scrutiny is required of such laws to ensure that they cannot be manipulated to the detriment of persons engaged in speech-related businesses.

Second, even apart from the "singling out factor," this case – unlike *Arcara* – involves a *licensing* law. As early as *Lovell v. City of Griffin*, *supra*, this Court noted that laws requiring a license to engage in speech are *inherently* suspect and were one of the primary factors motivating enactment of the First Amendment. It would violate the Framers' intent to apply deferential scrutiny to any aspect of a law requiring a license to engage in expression. *See*, e.g., discussion in *Thornhill v. Alabama*, 310 U.S. 88, at 97-98 (1940).

Third, in *Arcara*, closure was not simply automatic upon proof of a single incident of unlawful activity. A judge had traditional equitable discretion to abate the premises only if such drastic relief was deemed warranted. By contrast, under the Dallas ordinance, proof of a *single* isolated unlawful[13] act at a location *compels* the non-renewal or revocation of the license, even though such punishment may be grossly disproportionate. Moreover, the determination that a violation has occurred is made *administratively*, not *judicially*.

Fourth, the restraint in *Arcara* was far less sweeping. Cloud Books was free to re-establish its business at any other location. In contrast, Dallas' ordinance blanketly prohibits one with a prior conviction from engaging in these First Amendment activities *anywhere* in the City.

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[13] Under Dallas' ordinance, the bases for revocation are not limited to proof of prior criminal *convinctions*. They also include *administrative* determinations of non-compliance with mere *regulatory* provisions! *See*, e.g., Dallas City Code § 41A-10(b) (1)-(4) and (6)-(8).

In sum, the deferential scrutiny applicable to the law of general application upheld in *Arcara* is manifestly inappropriate for reviewing the restraint of speech imposed by this *administrative licensing* scheme.

V

THE REMAINING CHALLENGES TO THIS LICENSING SCHEME PRESENTED IN PETITIONER'S OPENING BRIEF ARE PROPERLY BEFORE THIS COURT.

In Point IV of their opening brief, petitioners pointed out that the Dallas licensing scheme is so riddled with unconstitutional features that it must be stricken in its entirety. In addition to those features already discussed, this also included multiple provisions giving the Chief of Police substantive discretion for the denial of a license (P.O.B., p. 42), the inspection provisions authorizing *five* different agencies to conduct *warrantless* inspections and mandating a license denial for non-compliance with those requirements (P.O.B. p. 45), the provisions which prevent re-application for 90 days after a revocation order or a ruling denying renewal, even after all the bases for the prior revocation or non-renewal have been corrected (P.O.B., p. 44), and the provision disqualifying not only those who have had prior criminal convictions but also those who merely *reside* with persons who have had prior criminal convictions or prior license denials (P.O.B., p. 44). Respondents claim that these issues are not within the scope of this Court's order granting certiorari and therefore should not be addressed. In contrast, some of their amici considered those issues to be properly presented and have requested a favorable ruling thereon.

Petitioners respectfully submit that this Court's order granting review is sufficiently broad to permit consideration of these issues. The provision prohibiting issuance of a license to one who resides with one who has suffered a conviction is clearly subsumed within Question Presented No.

1 in the certiorari petition of petitioners herein.[14] Similarly, the validity of the provision prohibiting re-application within 90 days after all prior problems have been solved is certainly pertinent to the *Freedman* point which was expressly raised in the questions presented in the separate certiorari petitions filed by petitioners M.J.R. and FW/PBS. It is respectfully submitted that the balance of these issues are subsumed within the second question presented for review in the certiorari petition of FW/PBS (which, of course, was consolidated with the petition in *M.J.R., Inc. v. City of Dallas*).

Petitioners believe that the ordinance's *Freedman* deficiencies will require the complete invalidation of the licensing requirement of § 41A-4(a). If they are incorrect, then there are so many other constitutional problems with this ordinance that its overbreath is substantial judged in relation to its plainly legitimate sweep and it must be stricken in its entirety. *See, Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503, n.12 (1985).

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[14] That Question Presented expressly placed before the Court the issue of whether *spousal* convictions were constitutionally permissible as grounds for a license denial or revocation.

CONCLUSION

For all of the reasons above, the judgment of the Court of Appeals for the Fifth Circuit should be reversed and that Court should be directed to order the District Court to enjoin enforcement of the ordinance. Failing that, the judgment of the Court of Appeals should be vacated and that Court should be instructed to reassess this ordinance under a standard of strict judicial scrutiny.

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Respectfully submitted,

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